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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Siskiyou)**

THE PEOPLE,

Plaintiff and Respondent,

v.

BRETT CHRISTOPHER RHODES,

Defendant and Appellant.

C085781

(Super. Ct. No.
SCCR-CRF-2017-855-1)

Defendant Brett Christopher Rhodes appeals a judgment entered after his no contest plea to one count of arson in exchange for the dismissal of the remaining three arson counts and a sentence of felony local time in county jail. Defendant argues that while the trial court denied his request for a certificate of probable cause, the court's statements at sentencing equate to the issuance of a certificate under *People v. Holland*

(1978) 23 Cal.3d 77 (*Holland*), thus permitting him to challenge on appeal the trial court's erroneous denial of his request to withdraw his plea.

We disagree and dismiss his appeal.

FACTUAL AND PROCEDURAL BACKGROUND

The People filed a felony complaint charging defendant with four counts of arson in violation of Penal Code section 451, subdivision (c).¹ Prior to his preliminary hearing, defendant elected to resolve his case by pleading no contest to the first count of that complaint, in exchange for dismissal with a *Harvey*² waiver to the remaining three arson counts and a sentence of felony local time in county jail not to exceed one year. Defendant acknowledged the consequences of his plea including that, as a consequence of that plea, he would have to register as an arson offender. At the plea hearing, defendant stated more than once that he was not admitting the crime, but was just “taking advantage of the deal.” In response to these and similar statements, the trial court expressed a concern, resulting in the following exchange:

“THE COURT: You’ve mentioned that a number of times now which makes me concerned because you understand that unless the prosecution can prove your case beyond a reasonable doubt at trial you’re entitled to an acquittal. So unless you are making an intelligent choice and—

“[DEFENDANT]: I’m basing my choice off of what my lawyer told me.

“THE COURT: —wise decision to go forward with a [no contest] plea rather than a jury trial. I’m uncomfortable with this. Are you reaffirming that that’s your choice?

“[DEFENDANT]: I still plead no contest.”

¹ Undesignated statutory references are to the Penal Code.

² *People v. Harvey* (1979) 25 Cal.3d 754.

Thereafter, the trial court accepted defendant's no contest plea, finding it was knowing, intelligent, and voluntary and that he understood the consequences thereof.

Prior to sentencing, defendant moved to withdraw his plea arguing that the charges should have been filed in federal court and that the district attorney's office coerced his plea by filing four felony arson charges against him and then offering to let him plea to one of them. In addition to these arguments, at the hearing on the motion, defendant asked whether he could have the charge reduced from arson to unlawful burning (§ 452), which would allow him to continue his career as a wildland firefighter. According to defendant's attorney, the People had previously rejected this offer. The court explained that jurisdiction was proper and denied the motion to withdraw the plea.

That same day, the trial court suspended imposition of sentence for the arson count and granted defendant three years of probation with 180 days in county jail and credit for 148 days. Defendant asked whether there was any way—upon successful completion of probation—to have his arson charge revoked, and the court explained that it could not give him legal advice. It then advised defendant, "I am going to be giving you some advice with regard to your appeal rights, so that's something you can take into consideration. [¶] I denied your motion to withdraw your plea, so that's something you can potentially address on appeal if that's something you choose to do."

Defendant timely filed his notice of appeal, but the trial court denied his request for a certificate of probable cause, marking it " 'Inoperable' " in accordance with California Rules of Court, rule 8.304(b)(3). Defendant then filed a second notice of appeal, purporting to challenge matters unrelated to the validity of his plea.

DISCUSSION

1.0 Denial of Defendant's Request for a Certificate of Probable Cause

Defendant argues the trial court's statements at sentencing in effect certified the appeal, allowing his case to proceed despite the trial court's denial of his request for a certificate of probable cause. We disagree.

As the Supreme Court explained in *People v. Johnson* (2009) 47 Cal.4th 668 (*Johnson*): "Section 1237.5 states broadly that '[n]o appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere . . . except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.' (§ 1237.5, italics added.) 'The purpose and effect of section 1237.5 . . . are . . . to create a mechanism for trial court determination of whether an appeal raises *any nonfrivolous* cognizable issue, i.e., any nonfrivolous issue going to the legality of the proceedings. Before the enactment of section 1237.5, the mere filing of a notice of appeal required preparation of a record and, in many cases, appointment of counsel; only after expenditure of those resources would an appellate court determine whether the appeal raised nonfrivolous issues that fell within the narrow bounds of cognizability. Section 1237.5 was intended to remedy the unnecessary expenditure of judicial resources by preventing the prosecution of frivolous appeals challenging convictions on a plea of guilty.' [Citation.]

" 'Section 1237.5 does not limit the scope of review of the denial of a motion to withdraw a plea of guilty when that error is properly before the court on appeal. It merely sets forth a procedure for precluding frivolous appeals by requiring the defendant to set forth grounds for appeal and, if he does so, by requiring the trial court to rule on the

issue of probable cause.’ [Citation.] The trial court must issue the certificate if the defendant’s statement under section 1237.5 presents ‘any cognizable issue for appeal which is not *clearly* frivolous and vexatious’ [Citation.] . . . If the trial court wrongfully refuses to issue a certificate, the defendant may seek a writ of mandate from the appellate court.” (*Johnson, supra*, 47 Cal.4th at p. 676.)

Defendant acknowledges that he did not obtain a certificate of probable cause, but nonetheless argues that the trial court in effect certified this appeal when it said at sentencing: “I am going to be giving you some advice with regard to your appeal rights, so that’s something you can take into consideration. [¶] I denied your motion to withdraw your plea, so that’s something you can potentially address on appeal if that’s something you choose to do.” We disagree.

We first question the continuing viability of the exception recognized in *Holland, supra*, 23 Cal.3d at page 84, which stated that appellate review without a certificate of probable cause is proper where “the trial court has, by its statements or conduct, in effect certified the appeal” (See *People v. Mendez* (1999) 19 Cal.4th 1084, 1097-1098, fns. 7 & 9 [including *Holland* among string citations of cases applying section 1237.5 in a “relaxed manner” in a discussion that concluded the certificate of probable cause requirement should be “applied in a strict manner” and judicial economy has not been served by allowing exceptions to the probable cause requirement].)

Second, even if the *Holland* exception were still viable, we find the trial court’s statement that defendant could “potentially address on appeal” the trial court’s denial of his motion to withdraw his plea is not a statement that it was issuing him a certificate of probable cause to challenge the validity of that plea, which the same judge denied two days later. That defendant could “*potentially* address” that issue, implicitly recognizes the prerequisite of defendant’s applying for and successfully obtaining a certificate of probable cause. (*Italics added.*) (See *Johnson, supra*, 47 Cal.4th at pp. 677, 679

[defendant must obtain a certificate of probable cause to challenge denial of a motion to withdraw a guilty plea].) Therefore, we must dismiss this appeal for noncompliance with the probable cause requirement.

DISPOSITION

The appeal is dismissed.

____ BUTZ _____, Acting P. J.

We concur:

____ MURRAY _____, J.

____ HOCH _____, J.